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APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22528

JOSEPH DeCESARE and RALPH BLACKBURN,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Florida

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(January 31, 1966.)

Before JONES and BROWN, Circuit Judges, and BREWSTER, District Judge.

PER CURIAM: Appellants seek to reverse convictions for willful failure to register for and pay to the District Director of Internal Revenue the special tax required of persons engaged in the business of accepting wagers (26 USCA §§4411-12) in violation of 26 USCA §7203. None of the four attacks has any merit.

First, venue in the Middle District of Florida was obviously correct under F.R.Crim.P. 18 prescribing that "prosecution shall be had in a district in which the offense was committed * * *," and under the "general rule that where the crime charged is a failure to do a legally required act, the place fixed for performance fixes the situs of the crime." *Johnston v. United States*, 1956, 351 U.S. 215, 220, 76 S.Ct. 739, 100 L.Ed. 1097, 1101-02; *United States v. Commerford*, 2 Cir., 1933, 64 F.2d 28, 32-33, cert. denied, 289 U.S. 759, 53 S.Ct. 792, 77 L.Ed. 1502; *Evans v. United States*, 5 Cir, 1965, 349 F.2d 653, 656.

Second, under the circumstances of this record, there was compliance with 18 USCA §3109 which prescribes that "the officer may break open any outer or inner door or window of a house * * * to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance * * *." In executing the warrant, the Government Agent announced himself by knocking on the door, identified himself as a Federal Agent armed with a warrant and demanded admittance. He heard movements within and smelled smoke and, apprehending that the occupants were attempting to destroy incriminating evidence (confirmed immediately upon entry), ordered his fellow officers to break open the door, enter the premises, and arrest the appellants. Bypassing the Government's first response that §3109 may not afford a basis for suppression (see *Barrientes v. United States*, 5 Cir., 1956, 235 F.2d 116, cert. denied, 352 U.S. 879, 77 S.Ct. 102, 1 L.Ed.2d 80), the actions were entirely reasonable and satisfied §3109. See *McClure v. United States*, 9 Cir., 1964, 332 F.2d 19, cert. denied, 1965, 380 U.S. 945, ___ S.Ct. ___, ___ L.Ed. ___; *Masiello v. United States*, D.C.Cir., 1963, 317 F.2d 121.

Third, Appellant Blackburn's belated registration and payment of the gambling tax on March 31, 1964, was ineffectual to erase the charged, and proved, violations occurring between March 1 and March 24, 1964. Under 26 USCA §4901, registration for and payment of the gambling tax is a "condition precedent to carrying on" the business of accepting wagers. The tax imposed "must be paid before engaging in the business wagering." *Lewis v. United States*, 1955, 348 U.S. 419, 422, 75 S.Ct. 415, 99 L.Ed. 475, 479; *Marderosian v. United States*, 1 Cir., 1964, 337 F.2d 759, 760, cert. denied, 1965, 380 U.S. 971, ---- S.Ct. ---, --- L.Ed. --- Consequently, no help comes from *Farmer v. United States*, 10 Cir., 1942, 128 F.2d 970.

Fourth, this record was quite sufficient for the jury to have concluded beyond a reasonable doubt that Appellants knew of the obligation to register for and pay the gambling tax and willfully failed to do so. *Edward v. United States*, 5 Cir., 1964, 334 F.2d 360 (en banc), cert. denied, 1965, 379 U.S. 1000, --- S.Ct. ---, --- L.Ed. ---; *Ingram v. United States*, 1959, 360 U.S. 672, 79 S.Ct. 1314, 3 L.Ed.2d 1503.

AFFIRMED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1965

No. 22528

D. C. Docket No. 64-276-Criminal Action

JOSEPH DeCESARE and RALPH BLACKBURN,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before JONES and BROWN, Circuit Judges, and BREWSTER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 31, 1966

Issued as Mandate:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22528

JOSEPH DeCESARE and RALPH BLACKBURN,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Florida.

(March 7, 1966.)

On Petition for Rehearing

Before JONES and BROWN, Circuit Judges, and BREWSTER, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled numbered cause be, and the same is, hereby DENIED.

United States Code

Title 26, §4401

"(c) Each person who is engaged in the business of accepting wagers shall be liable for and pay the tax under this subchapter..."

Title 26, §4411

"Then shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable..."

Title 26, §4412

"(a) Requirement - Each person required to pay a special tax under this subchapter... shall register with the official in charge of the internal revenue district..."

Title 26, §7203

"Any person required under this title to pay an estimated tax... who willfully fails to pay such estimated tax or tax... shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000 or imprisoned not more than 1 year, or both..."